No. 82-1186

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

TRANS WORLD AIRLINES, INC.,

Petitioner,

against

FRANKLIN MINT CORPORATION,
FRANKLIN MINT LIMITED, and
McGREGOR, SWIRE AIR SERVICES, LIMITED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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April 5, 1983

Questions Presented

1. Whether a treaty provision should be enforced nothwithstanding a subsequent Act of Congress which abandoned the premise upon which the treaty provision had been based?

2. What is the proper conversion factor, if any, for the gold franc provision in the Warsaw Convention in view of the Congressional decision to eliminate an official price for gold?

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On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

The petition of Trans World Airlines, Inc. ("TWA") was served on 15 January 1983. The respondents, Franklin Mint Corporation, Franklin Mint Limited, and McGregor, Swire Air Services, Limited (collectively "Franklin Mint"),[1] did not file a brief in opposition within the thirty-day period set by Rule 22 because they filed their own petition on 1 March 1983. This filing was within the ninety-day period established by 28 U.S.C. 2101(c) and bears docket number 82-1465.

By letter dated 7 March 1983 the Court, by its Clerk, requested Franklin Mint to file a response to TWA's petition.

[1]Respondents' designation of corporate relationships pursuant to Rule 28.1 is stated in the appendix to this brief.

In addition Franklin Mint was also requested to address the issue of whether the International Air Transport Association ("IATA") and several of its member airlines should be permitted to intervene as parties to this proceeding. In response to the Court's request, Franklin Mint respectfully submits this brief.

ARGUMENT

POINT I

TWA lacks standing to petition this Court.

The district court granted TWA's motion to limit its liability. The Second Circuit affirmed this result.

"[T]he successful party below has no standing to appeal" from a judgment in his favor. *Public Service Commision* v. *Brashear Lines*, 306 U.S. 204, 206 (1939). Although the literal language of 28 U.S.C. §1254(1) says "any party", there is apparently no instance when the Court "has granted a petition filed by a party who prevailed on the merits in the court of appeals." R. Stern & E. Gressman, *Supreme Court Practice* 58 (5th ed. 1978) (footnote omitted). The only victorious parties whose petitions under §1254(1) have been granted have been those litigants prevailing in the district court and who filed a petition (1) after the losing party had appealed to the court of appeals and docketed the record in that court, but (2) before rendition of judgment by the appellate court. *See, e.g., United States* v. *Nixon*, 418 U.S. 683, 686-87 (1974); *United States* v. *United Mine Workers*, 330 U.S. 258, 269 (1947); *see also*, R. Stern & E. Gressman, *Supreme Court Practice* 434 (5th ed. 1978).

In the present case TWA was the victorious appellee in the proceeding before the Second Circuit. Consequently, its petition before this Court should be denied.

POINT II

The Court of Appeals did not act unconstitutionally.

In its petition TWA portrays the Second Circuit's decision as radically "abrogating a treaty" (TWA petition, p. 10). In fact, however, the appellate court's decision was not quite so dramatic and, in any event, was firmly supported by constitutional principles.

The Warsaw Convention[2] must first of all be seen in context. This multilateral convention was finalized in October 1929 based on a preliminary draft developed during the prior year. The airline industry was then in its infancy. Lindbergh crossed the Atlantic in 1927 and Earhart did so in 1928. "The larger airliners could carry 15 to 20 passengers at cruising speeds of about 100 miles per hour and over stages of about 500 miles." A. Lowenfeld, *Aviation Law* §2.1 at 7-26 (2d ed. 1981).

The Reporter to the Warsaw Convention, Henri de Vos, pointed out in his introductory remarks that in Belgium "on one single aerodrome in the summer season, there are up to 36 departures of regular lines by day." Minutes, Second International Conference on Private Aeronautical Law, October 4-12, 1929, Warsaw, 23 (Horner and Legrez trans. 1975). As the result of developments, there was "the possibility that tomorrow, in all countries, facilities will be set up for both day and night flights!" *Id.* The conclusion to be drawn was that "What the engineers are doing for machines, we, lawyers, must do the same for the law." *Id.*

The Convention was seen as the beginning of an on-going process to codify international air law. As a vice-president of the Convention stated

[2]Formally known as the Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* October 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. §1502 note (1970).

> Therefore, we should consider that in air navigation, it is necessary to begin by laying down the primary general rules of the problem; we make a first effort and we must be happy to do so. If there are improvements to be brought forth, life does not end today, we can do them later on. (*Id.* at 32.)

During the discussions of the Convention's liability limits, a French delegate noted that they were dealing with "a Convention which is drawn for a few years" (*id.* at 90).

The problem in the present case arises from the simple fact that the Convention was designed for a world in which the aviation industry and the international monetary system were radically different than they are now. Both on the international level and in the United States, the Warsaw Convention has proven to be extremely difficult to amend.[3] The unhappiness of the United States with the archaic provisions of the Convention has already led once to this country denouncing the Convention, although this renunciation was later withdrawn when the airlines made certain concessions. See 53 Dep't. State Bull. 923 (1965) and 54 Dep't. State Bull. 955-57 (1966).

In 1929, as well as in 1934 when the United States adhered to the treaty, there was no problem in converting the Convention's gold franc into dollars because there was a gold/dollar exchange rate set by statute. Gold Reserve Act of 1934, 48 Stat. 337 (1934); Presidential Proclamation No. 2072 of January 31, 1934, 48 Stat. 1730 (1934); Act of March 14, 1900, ch. 41, §1, 31 Stat. 45 (1900).

The existence of an official price of gold was the basic assumption on which the liability limit was based. Indeed, in 1929 and for several decades afterwards, there was internationally only

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[3]Although several amendments to the Convention have been proposed, none has been adopted in the United States. Other countries, such as the United Kingdom, adhere to the Convention in an amended form.

the one official price.[4] During the early 1970's as this official price occasionally changed, the Civil Aeronautics Board would state what the new limits were in dollars. *See, e.g.,* Civil Aeronautics Board Order 74-1-16, 39 Fed. Reg. 1526 (1974).

In 1976, in the so-called Jamaica Accords, the United States and other members of the International Monetary Fund decided to remove gold as the linchpin of the international monetary system. As part of its implementation of the Jamaica Accords, the United States repealed the Par Value Modification Act. In its final form that Act had mandated that one dollar "equals 0.828948 Special Drawing Right or, the equivalent in terms of gold, of forty-two and two-ninths dollars per fine troy ounce of gold." Par Value Modification Act, Pub. L. No. 92-268, 86 Stat. 116 (1972), *amended by* Pub. L. No. 93-110, 87 Stat. 352 (1973). In the Act of October 19, 1976, Pub. L. No. 94-564, 90 Stat. 2660 (1976), the par value of the dollar in terms of gold (and Special Drawing Rights) was eliminated. Consequently, by eliminating an official gold/dollar relationship, the Congress abandoned the basic assumption upon which the Convention's liability limit was based.

The legal principles applicable to the foregoing facts are straightforward. The interpretation of a treaty is a judicial question. *Sullivan* v. *Kidd*, 254 U.S. 433, 442 (1921); *see also Baker* v. *Carr*, 369 U.S. 186, 211-12 (1962); *Society for the Propagation of the Gospel In Foreign Parts* v. *New Haven*, 21 U.S. (8 Wheat.) 464, 491-94 (1823). A treaty is to be regarded as equivalent to an act of the legislature. *Valentine* v. *United States ex rel. Neidecker*, 299 U.S. 5, 10-11 (1936); *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C. J.). A treaty stands no higher than any other legislative act. *Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888).

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[4]In *Pierre* v. *Eastern Air Lines*, 152 F. Supp. 486, 487-88 (D.N.J. 1957), the court referred to a plaintiff's "provable damages against the carrier to the extent of an international gold standard of approximately $8,300, in case of ordinary negligence."

Thus it is clear that a treaty may be modified by a subsequent act of Congress. *Moser* v. *United States*, 341 U.S. 41, 45 (1951). A treaty may be entirely abrogated by a later statute. *Whitney* v. *Robertson*, 124 U.S. 190, 194-95 (1888); *Edye* v. *Robertson (The Head Money Cases)*, 112 U.S. 580, 597-99 (1884); *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 620-21 (1870).

In the present case the Congress abandoned the assumption concerning gold upon which Article 22 of the Convention had been based for over 45 years. The conclusion of the court of appeals that the subsequent Congressional act modified the Warsaw Convention is a decision that makes sense and is constitutionally valid.

Since the filing of TWA's petition, the Senate has had a perfect opportunity to render moot the Second Circuit's decision. Protocols 3 and 4 of the Montreal Protocols of 1976[5] came up for a vote on 8 March 1983 and were soundly rejected by the Senate. 129 Cong. Rec. S2279 (daily ed. March 8, 1983). Examination of the floor debates shows that the Protocols were asserted as a means of resolving *Franklin Mint* and other cases[6] that reflect "a growing frustration, and even rebellion, by the U.S. court system against the present [Warsaw] system." 129 Cong. Rec. S2277 (remarks of Sen. Percy). Nevertheless the Protocols were defeated, which was apparently the first time since 1960 that a treaty had been rejected by the Senate. "Air Liability Treaty Rejected by Senate," N.Y. Times, March 9, 1983, at D6, col. 5. Therefore it is no longer valid to say, as TWA does at page 12 of its petition, that the "United States

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[5]These protocols are reprinted in A. Lowenfeld, *Aviation Law, Documents Supplement* 985-1001 (2d ed. 1981).

[6]*In re Aircrash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301 (9th Cir. 1982); *In re Aircrash at Kimpo International Airport, Korea, on November 18 1980*, MDL-482 (C.D. Cal. Feb. 15, 1983). A copy of the latter decision is printed at pages A29-A35 of the Appendix to Franklin Mint's petition in No. 82-1465.

has given every indication via the Montreal Protocols that it continues to support a limitation, ..."[7]

In addition, notwithstanding the suggestion of TWA at page 18 of its petition, the decision of the court of appeals does not contradict a clear agency interpretation of the Convention. The C.A.B.'s order number 74-1-16, 39 Fed. Reg. 1526 (1974), was promulgated at a time when there was an official price of gold. More recently the C.A.B. has stated in an order that "We do not by our statements in this order express any views of the appropriate valuation of 125,000 francs as expressed in terms of gold." Civil Aeronautics Board Order 81-3-143 (March 24, 1981).

Although TWA cites an internal C.A.B. memorandum in support of the airline's position, what that document actually shows is that the agency intends not to disturb the status quo pending its demise.

> Because of the confusion inherent in converting Warsaw's limits when there is no official rate of gold and the equitable considerations raised by the low limits currently in force, we believe the Board should develop a coherent policy resolution of the questions, and then meet with the Department of Transportation and State to review this problem. These agencies will be solely responsible for enforcing Warsaw in the future and have participated actively in formulating U.S. policy in this area in the past. (J. Golden, Warsaw Convention Liability Limits (May 20, 1981) (unpublished memorandum by the Director of The Bureau of Compliance and Consumer Protection, Civil Aeronautics Board), page A-92 of the Appendix to TWA's petition.)

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[7]It can also no longer be asserted, if it ever could, that the Second Circuit's decision violates Article 18 of the Vienna Convention of the Law of Treaties, 8 I.L.M. 679, 686 (1969). That provision requires a state "to refrain from acts which would defeat the object and purpose of a treaty . . . until it shall have made its intention clear not to become a party to the treaty". The Senate's action satisfied the qualification.

As the Second Circuit correctly pointed out: "The sole criterion supporting the C.A.B.'s position appears to be the law of inertia." *Franklin Mint Corp.* v. *Trans World Airlines, Inc.*, 690 F.2d 303, 310 (2d Cir. 1982).

Finally, and contrary to TWA's assertions, the court of appeals was correct in determining that there is "international disarray" on this subject. *Id.* at 309. Thus, some countries, such as Sweden, provide by domestic legislation a method by which to convert validly the Convention's gold franc into currency. Sweden's Aviation Act of 1957, Amendment to Article 22, Chapter 9, effective April 27, 1978. Other nations, such as the United Kingdom, have resolved the issue by agency order. United Kingdom's Carriage by Air (Sterling Equivalents) (No. 2) Order 1980, Statutory Instruments 1980 No. 1873. Still other countries, for example Argentina, have settled the matter by judicial decision. *Florencia, Cia Argentina de Seguros, S.A.* v. *Varig, S.A.*, Buenos Aires, Argentina, August 27, 1976 (National Court of Appeals) [1977] Uniform L. Rev. 198.

The judges in the various countries who have addressed the issue have reached varying results. The free-market price of gold has been used. *Cosida S.p.A.* v. *B.E.A.*, Milan Ct. of App., No. 2796/77 (June 9, 1981; Judgment No. 861). The last official price of gold has been used. *Pakistan International Airlines* v. *Compagnie Air Inter S.A.*, No. 79/2278, Court of Appeals of Aix-en-Provence, France (October 31, 1980). The Special Drawing Rights of the International Monetary Fund have been used. *Linee Aeree Italiane* v. *Riccioli*, Rome Civ. Ct. (November 14, 1978: Judgment 609/1979). The current French franc has also been utilized. *Chamie* v. *Egyptair*, Paris Ct. of Appeal (January 31, 1980).

The conclusion to be drawn, both on the question of Article 22 and as to the Warsaw Convention generally, was ably stated by a leading aviation lawyer "the Warsaw Convention has been revised and re-revised many times, both legally and extra

legally, with the result that the tangled network that is the Warsaw system comprising the original treaty and all its related instruments is a disgraceful shambles." B. Cheng, "Wilful Misconduct: From Warsaw to the Hague and from Brussels to Paris, 1977 Annals of Air and Space Law 55. In the absence of an amendment adhered to by all member nations, there is simply no way to achieve international uniformity on the question of liability limits.[8] Because of the lack of international uniformity on the question, each nation has resolved the matter internally in accordance with its own constitutional structure.

Franklin Mint contends that the decision of the court of appeals makes sense, is constitutionally valid, and has been upheld by the recent action of the Senate. The appellate decision violates no settled agency interpretation of the Convention, conflicts with no other decision by a circuit court, and does not disturb any international consensus of opinion on the subject. Consequently, TWA's petition should be denied.[9]

POINT III

The motion by IATA for leave to intervene should be denied.

Intervention in proceedings before this Court "is a remedy seldom invoked and rarely granted." R. Stern & E. Gressman, *Supreme Court Practice* 436 (5th ed. 1978). "Only for the

[8]There certainly has been no groundswell to approve the Montreal Protocols. Article IX of Protocol No. 3, for instance, requires thirty nations to ratify that treaty before it goes into effect. So far, the only states to have done so are apparently Brazil and the Philippines. R. Mankiewicz, *The Liability Regime of the International Air Carrier* 238-39 (1981).

[9]Franklin Mint's sole objection to the Second Circuit's opinion is that it held the Article 22 limit to be unenforceable only prospectively. In its petition Franklin Mint contends that the limit is unforceable from 1 April 1978, the date when the United States eliminated the official price of gold.

most imperative of reasons and where one's interests may otherwise be lost will the Court entertain a motion to intervene in pending proceedings before the Court." *Id.* The unusual circumstances required for intervention are not present in the matter at hand.

TWA has been ably represented at all stages in this litigation. The district judge referred to TWA's memoranda on the disputed question as "extraordinarily lucid and comprehensive." *Franklin Mint Corp. v. Trans World Airlines, Inc.*, 525 F. Supp. 1288, 1289 (S.D.N.Y. 1981). TWA has vigorously asserted the rights of the airline industry, and there is no reason to believe that it will not continue to do so.

The fact that TWA is pursuing this matter immediately distinguishes this case from decisions cited by IATA such as *Banks* v. *Chicago Grain Trimmers*, 389 U.S. 813 (1967), 390 U.S. 459 (1968). In *Banks* the intervening petitioner was the real party in interest adversely affected by the lower appellate decision. Upon a showing that the party who was the nominal loser did not intend to seek certiorari, the non-party was permitted to intervene in order to file a petition. Likewise, in *Hunter* v. *Ohio ex rel. Miller*, 396 U.S. 879 (1969), a non-party, who was the real party in interest, was allowed to intervene and file a petition when the named losing party would not seek review. See R. Stern & E. Gressman, *Supreme Court Practice* 59, 1062 (5th ed. 1978).

IATA has filed an *amicus* brief in support of TWA's petition. If this petition is granted, then IATA's position can be easily protected by an *amicus* brief on the merits. Franklin Mint consented to IATA filing an *amicus* brief on the petition and has no objections to an IATA *amicus* brief on the merits. The Court should deny the request to intervene, but grant leave to file an *amicus* brief. *See Ohio Bureau of Employment Services* v. *Hodory*, 429 U.S. 814 (1976).

CONCLUSION

TWA's petition for a writ of certiorari should be denied.

Respectfully Submitted,

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April 5, 1983

APPENDIX

Designation of Corporate Relationships

Franklin Mint Corporation, Franklin Mint Limited, and McGregor, Swire Air Services Limited, filing this brief in opposition as respondents in this proceeding, state that:

1. This is their original Designation of Corporate Relationships.

2. Franklin Mint Corporation is a subsidiary of Warner Communications, Inc.

3. Franklin Mint, Limited is a subsidiary of Warner Communications, Inc. (U.K.), which is in turn a subsidiary of Warner Communications, Inc.

4. McGregor, Swire Air Services Limited, presently known as McGregor Sea & Air Services, Ltd., is a subsidiary of Ocean Cory, Ltd., which is in turn a subsidiary of Ocean Transport & Trading plc.

5. Affiliates and subsidiaries of Franklin Mint Corporation and Franklin Mint, Limited are:

Atari, Inc.
Atlantic Records
WEA Manufacturing
Warner Bros.
Panavision
DC Comics
Warner Cosmetics
Warner Amex Cable Communication
Knickerbocker Toy
Elektra/Asylum/Nonesuch Records
Warner Special Prods.
Warner Bros. Television
Warner Home Video
Mad Magazine

Designation of Corporate Relationships

Cosmos Soccer
Warner Amex Satellite Entertainment Co.
Malibu Grand Prix
Warner Bros. Records
WEA International
Warner Bros. Music Publishing
Licencing Corp. of America
Warner Books
Warner Publisher Services
Warner Theatre Prods.

6. Affiliates and subsidiaries of McGregor, Swire Air Services Limited are:

McGregor Uyeno K.K.
Calayan Co., Ltd.
McGregor Swire Air Services (Malaysia) Sdn. Bhd.
G.E. Green & Co. Pty., Ltd.
MSAS SRL
Society Francaise Wm. Cory et Fils
MSAS Transport GmbH